Supreme Court, U.S.
FILED
JAN 29 2010
OFFICE OF THE CLERK

No. 09-638

IN THE

Supreme Court of the United States

LEROY HILL, JR.,

Petitioner,

v.

EMORY UNIVERSITY, EMORY HEALTHCARE, INC. d/b/a EMORY WINSHIP CANCER INSTITUTE, DEDRA F. CANTRELL A/K/A DEDRA FRUTCHEY AND SANDRA MURDOCK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether this Court should grant Petitioner a writ of *certiorari* in order to review the Eleventh Circuit's holding that Petitioner failed to establish pretext, in order to address the *prima facie* elements of a race discrimination claim in the context of a reduction-in-force where the courts of appeals are not in conflict on this issue and where the lower courts assumed that Petitioner established a *prima facie* case such that the Court's review would not change the outcome of Petitioner's case?

(2) Whether this Court should grant Petitioner a writ of *certiorari* in order to review the Eleventh Circuit's holding that Petitioner failed to establish that he was subjected to severe and pervasive racial harassment, in order to address what actions by an employer constitute an adverse action, where an adverse action is not an element of a *prima facie* case of racial harassment and where the Eleventh Circuit's holding is not in conflict with a decision of this Court or another court of appeals?

CORPORATE DISCLOSURE STATEMENT

There is no parent corporation of Respondent Emory Healthcare, Inc. and no publicly held company owns shares in the corporation.

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STATEMENT OF THE CASE

Respondents disagree with Petitioner's Statement of the Case because it is factually incorrect, it contains irrelevant material, it contains no cites to the record and it does not set out the facts necessary to consideration of the questions presented. Indeed, Petitioner (who failed to object to any of the District Court's findings of fact or to any portion of the record before the Eleventh Circuit) does nothing more than reiterate the facts that he argued before the lower courts. Rather than correct all of Petitioner's misstatements of the record, Respondents will correct only those facts which bear on the questions presented. Accordingly, Respondents submit the following Statement of the Case:

1. Applicable Law

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") prohibits various employment practices involving discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e-2, 2000e-3. 42 U.S.C. § 1981 ("Section 1981") also prohibits discrimination against blacks and other racial minorities in the making and enforcing of contracts. *See* 42 U.S.C. § 1981. A plaintiff alleging disparate treatment, whether under Title VII or Section 1981, bears the ultimate burden of persuading the fact-finder that his treatment was caused by "purposeful or intentional discrimination." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). However, because it is difficult for the plaintiff to obtain direct evidence of the employer's motive, this Court in *McDonnell*

Douglas Corp. v. Green, articulated a burden-shifting framework of proof that gives the plaintiff the benefit of a presumption operating in his favor. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that burden-shifting framework, a plaintiff must first establish a *prima facie* case; the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for the adverse employment action. Once such a reason has been articulated, any presumption of discrimination raised by the *prima facie* case drops from the case and the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not true, but was a pretext for discrimination. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *see also Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000).

As this Court has repeatedly recognized, the *prima facie* case method established in *McDonnell Douglas* was never intended to be "rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (*quoting Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335, n. 15 (1977)). Indeed, the ultimate "factual inquiry" in any Title VII case is "whether the defendant intentionally discriminated against the plaintiff. In other words, is the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Constr. Corp.*, 438 U.S. at 577.

This Court expanded the scope of Title VII by recognizing that the prohibition against "discrimination" protects employees from discriminatory sexual harassment and racial harassment. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116, n. 10 (2002); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-66 (1986). In order to establish a hostile work environment claim based on race, a plaintiff must show that: (1) he belongs to a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment was severe and pervasive; and (5) the employer knew, or should have known, of the harassment and failed to take prompt remedial action. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). In considering the fourth element of the case—whether the harassment was severe and pervasive—this Court has held that the harassment must be "sufficiently severe or pervasive to alter the employee's terms and conditions of employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1996). In determining whether an actionable hostile work environment claim exists, a court will also look to "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humility, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (*quoting Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). Although the harassment must affect the terms and conditions of a plaintiff's employment in order to be actionable as severe and pervasive harassment, there is absolutely no requirement that a plaintiff prove that he suffered an

adverse employment action in order to sustain a claim of hostile work environment based on race.[1]

2. Facts

Leroy Hill ("Petitioner" or "Hill"), a black male, was hired by Emory Healthcare, Inc. ("EHC") in 1998 as the Director of Data Services and Decisions Support in EHC's Information Services ("IS") Department. (Pet. App. at 16a). Hill reported directly to Dedra Cantrell, the Executive Director of Applications Services, who in turn reported to Ron Palmich, the Chief Information Officer ("CIO"). (*Id.*). In February 2000, Palmich asked Cantrell to assist him in conducting what he called a "pulse check" in the IS department. (*Id.* at 18a). During the pulse check, several employees under Hill's supervision complained to Cantrell about Hill's poor leadership skills. (*Id.*) Around the same time, one of Hill's reports transferred out of the group due to his dissatisfaction with Hill's leadership skills and the fact that working for Hill was like being in the movie "Groundhog Day," where every day is an exact repetition of the day before and nothing is accomplished. (*Id.* at 19a). Effective July 31, 2000, the Human Resources Department and Palmich changed the job titles of several directors who were direct reports of Cantrell to more accurately reflect their roles in the department. (*Id.* at 22a). The "directors" were reclassified as "managers." Hill was one of the directors affected by this change in job title; his title changed from "Director

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[1] Proof of an adverse action, however, is part of a plaintiff's *prima facie* case of retaliation under Title VII. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

of Data Services and Decisions Support" to "Manager of Data Applications." This change in job title did not affect Hill's job duties or salary. (*Id.*)

In March 2001, Hill was promoted to the position of Director of Oncology Informatics at the Emory Winship Cancer Institute ("WCI") and received a 10% pay increase. (*Id.* at 22a-23a). Hill's primary role in his new position was project manager for a high-profile informatics project known as GeneSysSI ("GSI"). Administratively, Plaintiff remained an EHC employee and his salary was "charged back" to WCI, meaning that WCI paid Hill's salary while he remained an employee of EHC. (*Id.* at 23a). Hill reported jointly to Cantrell and WCI's Chief Operating Officer, Sandra Murdock. (*Id.*) Following his promotion, Hill's office was relocated to the second floor of the EHC building. (*Id.*) Hill requested office space from WCI but was told that no space was available at that time. (*Id.*) In July 2003, WCI Building C opened, and Hill's peers moved into private offices in that building. (*Id.*) Hill again requested office space from WCI, but his request was denied. (*Id.*) In October 2003, Hill learned of plans to return his office to the fourth floor of the EHC building. (*Id.*) Unhappy with this plan, he complained about his office space situation to the Chief Executive Officer of EHC and the very next day, he received office space in WCI Building B. (*Id.*)

In 2004, GSI moved from its original developmental phase into a maintenance phase, which required less oversight by Hill. (*Id.* at 26a). Also, GSI began to suffer from budget problems as its spending far exceeded its revenue. Due to the budget problems, funding for GSI—

including Hill's salary—was thereafter provided by the Woodruff Fund, Inc. ("Woodruff Fund"), a charitable foundation account. (*Id.*) In the Spring of 2005, Murdock planned the fiscal year 2006 budget, in which she implemented various budget cuts. (*Id.* at 27a). During this process, she considered eliminating Hill's position. (*Id.*) She subsequently discussed the elimination of Hill's position with Cantrell. (*Id.*) Murdock and Cantrell agreed to eliminate Hill's position and, on April 6, 2005, formally requested the personnel action from EHC's Human Resources Department. (*Id.* at 28a) Murdock and Cantrell then scheduled a termination meeting with Plaintiff for May 9, 2005 at 4:30 p.m. and prepared a termination letter to give to him at the meeting. (*Id.*) On May 9, at around 1 p.m., Plaintiff complained of discrimination to an employee in Emory University's Equal Opportunity Programs office. Upon returning to his office, Hill telephoned Murdock to inform her of his complaint. (*Id.*) At 4:30 p.m. on May 9, Murdock and Cantrell met with Hill to inform him of the decision to eliminate his position. (*Id.*)

3. The District Court Proceedings

Following the elimination of his position, Hill filed an action in the United States District Court for District of Northern Georgia, on July 19, 2006, alleging racial discrimination, harassment and retaliation pursuant to Title VII and § 1981. Hill also raised state tort claims for intentional infliction of emotional distress, negligent hiring and negligent retention. On November 10, 2008, the Magistrate Judge issued her Final Report and Recommendation and Order ("R&R") which recommended that the District Court grant summary

judgment in favor of Respondents on all of Hill's claims. Hill subsequently filed objections to the R&R, however, he failed to specifically object to any single fact that was included in the R&R. On December 16, 2008, the District Court correctly denied Hill's objections and adopted the Magistrate Judge's R&R, granting summary judgment to Respondents on all of Hill's claims. In holding that Hill had failed to establish that Respondents' legitimate, non-discriminatory reasons for his job elimination were a pretext for unlawful discrimination or retaliation, the District Court explicitly found that WCI was running a deficit and noted that the "WCI in general and the Woodruff account fund from which Plaintiff's salary was paid were experiencing budget problems at the time of Plaintiff's termination." (Pet. App. 38a). The District Court, which did not dismiss Hill's race claim for failure to state a *prima facie* case, further opined on Hill's failure to establish pretext:

> Because Respondents offer legitimate non-discriminatory reasons for dismissal, namely: (1) that the Genesys SI project was complete and in production support mode; and (2) further Genesys SI expansion across EHC had not been funded; and because none of plaintiff's budgetary measurements show these claims to be pretextual, plaintiff fails to create a genuine issue of material fact concerning his wrongful termination claim.
>
> (Pet. App. at 38a).

The District Court did not hold that Hill failed to establish a *prima facie* case of discrimination. (*Id.*)

Accordingly, the District Court granted summary judgment to Respondents on Hill's discriminatory termination claim based on race, as well as his state law claims and his harassment and retaliation claims under Title VII and § 1981. (*Id.*)

4. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed the District Court's decision to grant summary judgment to Respondents on all of Hill's claims in a *per curiam* unpublished opinion dated August 25, 2009. Based on Hill's failure to appeal any of the District Court's findings of facts, all of the District Court's factual findings became part of the record on appeal. In reviewing *de novo* the District Court's dismissal of Hill's race and retaliation claims under Title VII and § 1981, the Eleventh Circuit (like the District Court) properly applied the *McDonnell Douglas* burden-shifting framework and found that Hill failed to establish pretext and held:

> Here, the record showed that both WCI and the Woodruff Fund, from which Hill was paid, were running budget deficits; the program that Hill was hired to develop had m o v e d into a maintenance phase that required less of Hill's time and was handled primarily by an outside vendor; and Hill's remaining job duties were shared among lower-earning employees after his termination. Hill did not show that these stated reasons for his termination were pretextual. Therefore, Hill did not establish that the district court erred

> in granting summary judgment to the Respondents on his termination or retaliation claims.
>
> (Pet. App. at 9a).

Notably, in affirming summary judgment in favor of Respondents on Hill's discriminatory termination claim based on race, the Eleventh Circuit did not hold that Hill failed to establish a *prima facie* case and instead assumed that he had made his *prima facie* showing. Indeed, the Eleventh Circuit's Decision (like the District Court's) contains no analysis of Hill's *prima facie* case and only references the elements of a *prima facie* case in its articulation of the burden-shifting framework of *McDonnell Douglas*. (Pet. App. at 6a). Thus, the Eleventh Circuit properly applied the *McDonnell Douglas* framework and dismissed Hill's discrimination claim based on his failure to show pretext and not on his failure to establish a *prima facie* case.

The Eleventh Circuit next affirmed the District Court's decision that Hill failed to establish a claim for hostile work environment based on race. (Pet. App. at 13a). The Court of Appeals expressly rejected Hill's argument that he had established his harassment claim based on his allegation that Respondents subjected him to a handful of isolated, routine employment actions (*i.e.*, the department-wide "pulse check," the change in his job title from Director to Manager, failure to classify him as a regular WCI employee instead of a "chargeback" employee associated with EHC, failure to assign him the office space he desired, *etc.*) which he summarily claimed "clearly met the test of adverse

action, and actionable hostile work environment race discrimination." Specifically, the Court held that these routine personnel actions, "were not so objectively severe or pervasive as to alter the terms and conditions of his employment. Although he may have been subjectively humiliated, Hill's cited actions are objectively neither threatening or humiliating." (Pet. App. at 13a). Although the Court held that none of these routine, facially-neutral personnel actions constituted severe or pervasive harassment which altered the terms and conditions of his employment, it correctly did not address whether any of those actions constituted an adverse action for purposes of deciding Hill's racial harassment claim, since such an inquiry is not part of a plaintiff's *prima facie* case. Accordingly, the Eleventh Circuit concluded that "the district court did not err in granting summary judgment to the Respondents on Hill's hostile work environment claim." (*Id.* at 23a.).

REASONS FOR DENYING THE PETITION

The unpublished decision of the Eleventh Circuit is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Moreover, there is no circuit split regarding the *prima facie* elements of a discriminatory termination claim in the reduction in force ("RIF") context. Further, the Eleventh Circuit affirmed the dismissal of Petitioner's race discrimination claim based on his failure to establish pretext and not on his failure to establish a *prima facie* case. As such, the *prima facie* elements of a discrimination claim in the context of a RIF are not relevant to Petitioner's claims and would not affect the outcome of his case such

that he is improperly seeking an advisory opinion from this Court. Likewise, a purported circuit split regarding what constitutes an adverse action for purposes of a Title VII retaliation claim has no relevance to Hill's hostile work environment claim since it is not an element of his *prima facie* case. For these reasons, further review by this Court is not warranted and the Petition For A Writ of *Certiorari* should be denied.

I. The Purported Split Amongst The Courts Of Appeals Regarding The *Prima Facie* Elements Of A Discriminatory Termination Claim In The Reduction In Force Context Is Not Relevant And Would Not Affect The Outcome of Petitioner's Discrimination Claim Because The Eleventh Circuit Did Not Hold That Petitioner Failed To Establish A *Prima Facie* Case

Petitioner asks this Court to grant his Petition to address a purported split amongst the courts of appeals pertaining to his *prima facie* case, despite the fact that the Eleventh Circuit did not hold that Petitioner failed to establish a *prima facie* case of discriminatory termination based on race. (Pet. App. at 22-23). Indeed, the Eleventh Circuit assumed that Petitioner had established a *prima facie* case and dismissed Petitioner's claim based on its finding that Petitioner failed to establish that Respondents' legitimate, non-discriminatory reasons for his position elimination were a pretext for discrimination (or retaliation). (*Id.* at 9a). Thus, even if this Court were to grant the Petition and agree with Petitioner that there is a split amongst the courts of appeals regarding the *prima facie* elements

in the context of a RIF, such a decision would have no effect whatsoever on Petitioner's case. The Eleventh Circuit's determination—which petitioner neither challenges nor asks this Court to review—that Petitioner failed to show that Respondents' legitimate, nondiscriminatory reasons for his position elimination were a pretext for race discrimination would remain and would continue to support the determination that Respondents are entitled to summary judgment on Petitioner's discrimination (and retaliation) claims.[2] Consequently, even if there was a disagreement among the circuits on the question presented (which there is not), this case is clearly not the appropriate vehicle for considering that question because Petitioner's discrimination claim fails due to his failure to establish pretext. Therefore, because the Eleventh Circuit did not hold that Petitioner had failed to establish a *prima facie* case, review of that decision would be inappropriate in this case and amount to merely an advisory opinion. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not

[2] Although Petitioner summarily asserts in one sentence that "the Eleventh Circuit's conclusion that Hill did not show pretext is in error and should be rejected by this Court" (Pet. App. at 29), this issue is not properly before the Court and even if it were, Petitioner has failed to argue that the Eleventh Circuit's pretext finding is in conflict with a decision of this Court or of another court of appeal. To be sure, Petitioner's mere statement of disagreement with the Eleventh Circuit's decision to dismiss his discrimination and retaliation claims for failing to show pretext is not sufficient to warrant this Court's review.

consider them here."); *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (noting that this Court does "not sit to decide hypothetical issues or to give advisory opinions about issues"). Accordingly, the Petition should be denied.

II. There Is No Split Amongst The Courts Of Appeals Regarding The *Prima Facie* Elements Of A Discriminatory Termination Claim In the Reduction In Force Context

Despite the fact that resolution of the issue would not affect the outcome of his discriminatory termination claim because the Eleventh Circuit did not hold that Petitioner failed to establish a *prima facie* case, Petitioner nonetheless asserts that this Court's review is warranted to resolve a conflict in authority regarding the *prima facie* elements of a discriminatory termination claim in the context of a RIF.[3] (Pet. App. at 22-23). In support of his unfounded argument, Petitioner

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[3] Petitioner also erroneously contends that the Eleventh Circuit required him to produce direct evidence of discrimination, however, even a cursory review of the Eleventh Circuit's well-reasoned decision reveals that it properly applied the *McDonnell Douglas* burden-shifting framework to Petitioner's discrimination and retaliation claims under Title VII and § 1981. (Pet. App. at 6a-9a). Similarly Petitioner's assertion that no plaintiff in the Eleventh Circuit has ever established a *prima facie* case in an action arising from a RIF (Pet. App. at 29) is belied by at least one of the decisions to which he cites. *See Jameson v. Arrow Co.*, 75 F.3d 1528 (11th Cir. 1996) (holding that plaintiff established a *prima facie* case with respect to her discrimination claim arising from a RIF but granting summary judgment to employer based on plaintiff's failure to show pretext).

cites several cases (Pet App. 24-28) to suggest that there is a circuit conflict regarding the *prima facie* elements in the context of a RIF. As an initial matter, the decision below is unpublished and it does not establish controlling precedent (Pet. App. at 1a; *see* 11th Cir. R. 36-2), and it therefore does not give rise to the type of conflict in published decisions that would warrant this Court's attention. As such, the Petition should be denied on this basis alone.

The Petition should also be denied because the decision below does not conflict with any of the decisions petitioner cites. First, most of the cases cited by Petitioner are stale and were decided over 20 years ago and address claims other than the type raised by petitioner (claims under the Age Discrimination In Employment Act ("ADEA")), and therefore cannot present a conflict on the question presented here. (Pet. App. at 25-27, n. 7). Second, all of the cited decisions, like the decision below, agree that courts of appeals will apply the *McDonnell Douglas* framework in the absence of direct evidence and that direct evidence of discrimination is not required at the *prima facie* stage. *Compare Coburn v. Pan Am. World Airways, Inc.*, 711 F.2d 339 (D.C. Cir. 1983) (stating that direct evidence is not required to prove a *prima facie* case of discrimination in the context of a RIF), *and Massarky v. Gen. Motors Corp.*, 706 F.2d 111 (3d Cir. 1983) (accepting circumstantial evidence of discrimination at the *prima facie* stage), *with Rowell v. BellSouth Corp.* 433 F.3d 794, 798 (11th Cir. 2005) (noting that the *prima facie* elements in the context of a RIF require a plaintiff to show that he is: (1) within the protected age group, (2) adversely affected, (3) qualified

to assume another position at the time of discharge, and (4) "evidence, *circumstantial or direct*, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.") (*emphasis added*), *and Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1155 (8th Cir. 2007) (noting that a plaintiff in a RIF case may establish *prima facie* case by offering circumstantial evidence that his protected status was a factor in the termination decision), *and Skelton v. Sara Lee Corp.*, 249 Fed.Appx. 450, 457 (6th Cir. 2007) ("[I]n a RIF or reorganization case, the employee "does not make out a *prima facie* case absent direct, *circumstantial*, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.") (*emphasis added*). Moreover, the decisions cited by Petitioner, as well as decisions from the Eleventh Circuit and other circuits are in unanimity that a plaintiff may satisfy his *prima facie* burden by offering circumstantial evidence of intentional discrimination. (*Id.*) Although other courts of appeals have articulated the *prima facie* case in slightly different ways, such a variation does not result in the application of a different or more rigorous standard and is simply an inconsequential variation of the *prima facie* case. Such an inconsequential variation clearly does not constitute a split amongst the courts of appeals and certainly is not a compelling reason warranting *certiorari* review because, as this Court has long held, "the *prima facie* case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of

discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (*quoting Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977)) (The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff. In other words, is the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'").

Even if a slight variation regarding the articulation of the *prima facie* elements did constitute a split amongst the circuits, such a split is not important enough to warrant this Court's review as it only pertains to a plaintiff's exceedingly light burden of establishing a *prima facie* case and does not implicate the court's pretext analysis, which is the ultimate issue in any discrimination case where no direct evidence exists. As such, this purported split would never yield a situation where identical cases were adjudicated with different outcomes because the *prima facie* case has no bearing on a plaintiff's ability to show pretext and is only used to shift the evidentiary burden to Defendant to articulate a legitimate, non-discriminatory reason for its action. Because all of the circuits are in accord regarding the elements necessary for a *prima facie* case of race discrimination in the RIF context, Petitioner has failed to identify a split amongst the circuits and the Petition should be denied.

III. The Purported Split Amongst The Courts Of Appeals Regarding What Constitutes An Adverse Action In The Context Of A Title VII Retaliation Claim Is Not Relevant And Would Not Affect The Outcome of Petitioner's Hostile Work Environment Claim

The Eleventh Circuit properly held that the routine, facially-neutral personnel actions that Petitioner contended supported his racial harassment claim, "were not so objectively severe or pervasive as to alter the terms and conditions of his employment. Although he may have been subjectively humiliated, Hill's cited actions are objectively neither threatening or humiliating." (Pet. App. at 13a). Petitioner nonetheless asserts, however, that this Court's discretionary review is warranted to resolve a conflict in authority on the issue of what constitutes an adverse action for purposes of construing his racial harassment claim, despite the fact that an adverse action is not an element of his harassment claim and the fact that his harassment claim was not dismissed for failure to demonstrate that an adverse action was taken against him. (Pet. App. at 32) In support of this baseless argument, Petitioner cites seven (7) cases, all of which focus on the types of employer actions which can be deemed "adverse actions" within the context of a Title VII retaliation claim. (Pet. App. 32-33). Clearly, Petitioner's argument and the case law upon which he relies demonstrates a fundamental misunderstanding of the necessary elements for a hostile environment claim based on race, which are that: (1) Plaintiff belongs to a protected class; (2) he was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the harassment

affected a term, condition or privilege of employment; and (5) the employer knew, or should have known, of the harassment and failed to take prompt remedial action. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (Pet. App. at 12-13a). Because the definition of an adverse action in the Title VII retaliation is completely irrelevant to Petitioner's harassment claim, even if there were disagreement in the circuits on the question presented, this case is an inappropriate mechanism for considering that question because the Eleventh Circuit affirmed dismissal of Petitioner's harassment claim because he failed to show that he was subjected to severe and pervasive harassment. (Pet. App. at 13a). Thus, the Petition should be denied because resolution of the issue of what constitutes an adverse action in the Title VII retaliation context would not affect the outcome of Petitioner's racial harassment claim and would cause this Court to render a purely advisory opinion. *See Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (noting that this Court does "not sit to decide hypothetical issues or to give advisory opinions about issues. . . .").[4]

IV. The Eleventh Circuit's Decision Dismissing Petitioner's Racial Harassment Claim For Failing To Establish Severe And Pervasive Harassment Is Consistent With Decisions Of This Court And Other Courts Of Appeal

Petitioner summarily contends that the Eleventh Circuit's decision that Petitioner failed to show that he was subjected to severe and pervasive harassment

[4] While Hill raised a retaliation claim in his Complaint, his Petition herein raises no issues regarding that claim.

conflicts with the law of this Court, as well as decisions from other courts of appeal. (Pet. App. at 30). As an initial matter, the decision below is unpublished and it does not establish controlling precedent (Pet. App. at 1a; *see* 11th Cir. R. 36-2), and it therefore does not give rise to the type of conflict in published decisions that would warrant this Court's attention. As such, the Petition should be denied on this basis alone.

The Petition should also be denied because Petitioner has failed to identify any decision from this Court or from any court of appeals which conflicts with the Eleventh Circuit's decision to grant summary judgment to Respondents of Petitioner's racial harassment claim. The unambiguous law of the Eleventh Circuit, which is in harmony with the law of this Court and all other circuits plainly states that in evaluating whether an actionable hostile work environment claim exists, a court looks to "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101. 116 (2002) (*quoting Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002); (Pet. App. at 13a). The Eleventh Circuit's decision, as well as the law of this Court and the courts of appeals are also in accord that, in considering whether the alleged harassment was severe and pervasive, that the harassment must be "sufficiently severe or pervasive to alter the employee's terms and conditions of employment and create an abusive working

environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1996); (Pet. App. at 12a-13a).

Notably, Petitioner has not identified any decision from this Court or any court of appeal where a plaintiff successfully demonstrated severe and pervasive racial harassment based on a handful of trivial, facially-neutral personnel actions (*i.e.*, the change in his job title, failure to classify him as a regular WCI employee instead of a "chargeback" employee associated with EHC, failure to assign him the office space he desired, *etc.*). Likewise, as discussed in Section III, *supra*, Petitioner's misplaced reliance on cases examining what constitutes an adverse action in the context of a Title VII retaliation claim bear no relevance to Petitioner's harassment claim and certainly do not demonstrate that the Eleventh Circuit ignored precedent of this Court or rendered a decision which is in conflict with another court of appeal. Petitioner's claim that a split amongst the circuit courts exists regarding the necessary "quantum of proof" is nothing more than a veiled attempt to invoke this Court's jurisdiction where he simply disagrees with the Eleventh Circuit's application of the facts of his case to the established law. Thus, Petitioner has failed to demonstrate that the Eleventh Circuit's well-reasoned decision is in conflict with the law of this Court or with a decision of another court of appeal and the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition For A Writ Of *Certiorari* be denied.

Respectfully submitted,

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